Mat Roni bin Daud v Siti bte Hussin & Ors

HIGH COURT (KOTA BHARU) — CIVIL SUIT NO 137 OF 1982
IDRIS J
19 JANUARY 2000

Contract *— Mistake — Mutual/common mistake — Mistake as to registration of land transfer — Unrelated lot registered instead of actual land purchased — Original intention of parties disputed — Whether intention continues unaltered to time of execution of transfer — Only person who could testify to such intention died before hearing — No other supporting evidence available — Whether remedy of rectification should be granted*

Civil Procedure *— Estoppel — Issue estoppel — Issue not raised in earlier proceedings, whether fact in issue — Earlier proceedings dismissed due to lack of jurisdiction — No finality in earlier proceeding — Issue raised in subsequent proceedings — Whether defendants estopped from raising issue in subsequent proceedings*

The defendants were the registered co-owners of two pieces of land known as Lot 639 and Lot 196 of Mukim Perupok, Daerah Perupok, Bachok. The plaintiff sought a declaration that, inter alia, the plaintiff's father, who has passed away before the suit came on for trial, did purchase $^3/_5$ shares of Lot 639 in 1932, and not Lot 196, and Lot 639 be registered in the name of the plaintiff. The plaintiff contended that his father bought all the undivided shares in Lot 639 from the three registered owner of the lot but due to unknown reason or mistake, Lot 196 in the same area instead was transmitted and registered to the plaintiff. The defendants, on the other hand, claimed that there was no mistake and in fact, the plaintiff's father went into occupation of Lot 196 which was situated along the shore line until 1941 or thereabouts when the inhabitants along the shore line were evacuated due to an emergency. As a result of the forced evacuation, the plaintiff's father sought and obtained leave of the first defendant to occupy temporarily Lot 639. It was submitted that only after the complete erosion of Lot 196 that the plaintiff's father came up with an allegation of error in the registration of transfer. It was further submitted that on a number of occasions, the first defendant demanded the plaintiff's father to quit and deliver up vacant possession of Lot 639 but unfortunately to no avail. The defendants did in 1966 commenced a civil action against the plaintiff's father claiming for vacant possession of Lot 639 but it was subsequently struck out for want of jurisdiction. Hence the defendants counterclaimed for an order that the plaintiff forthwith quit and deliver up vacant possession of Lot 639 in addition to claiming damages for trespass and costs. The plaintiff's counsel argued that the defendants were estopped from relying on this defence since it was not raised in the defendants' earlier action.

Held, dismissing the plaintiff's claim with costs and allowing the defendants' counterclaims with costs:

(1) The plaintiff's father was the only person who could testify what was the original intention mutually agreed upon by both parties

and since he has passed away before the hearing of this action, the plaintiff would suffer a great setback when such evidence was lacking. The alleged mutual mistake was only a conjecture by the plaintiff without the aid of any supporting evidence to show that what was intended and agreed upon was to sell Lot 639 by the defendants to the plaintiff's father and that the intention had remained unaltered to the time of the execution of the transfer (see pp 610I–611A, 615G).

(2) The sessions court gave no judgment on the merits in 1966 as the court has not conferred with the necessary jurisdiction to deal with such an action and hence it was accordingly dismissed. Also, the plaintiffs (defendants in the present action) did not raise the issue of Lot 196 as it was not a fact in issue. It was in fact directly a claim for recovery of possession of Lot 639 and whatever relevance Lot 196 would evince, would be bourn out by evidence. Thus no such averment would need to be pleaded in the earlier statement of claim and counsel's complaint for such omission could not stand (see p 615A, C–D).

(3) The plaintiff had not successfully adduced sufficient evidence either verbal or documentary, especially relating to the lot which the parties intended to be transferred, to satisfy the well known requirements for the grant of the remedy of rectification. Accordingly, the registration of transfer at the District Office, Bachok was properly and correctly carried out (see p 618F–G).

[Bahasa Malaysia summary

Defendan-defendan adalah pemilik bersama berdaftar ke atas dua keping tanah yang dikenali sebagai Lot 639 dan Lot 196 di Mukim Perupok, Daerah Perupok, Bachok. Plaintif telah memohon satu deklarasi bahawa, antara lain, bapa plaintif, yang telah meninggal dunia sebelum guaman dibicarakan, telah membeli $^{3}/_{5}$ daripada bahagian Lot 639 pada tahun 1932, dan bukan Lot 196, dan menegaskan bahawa bapa beliau telah membeli semua bahagian yang tidak dibahagikan di dalam Lot 639 daripada tiga orang pemilik berdaftar lot tersebut tetapi disebabkan oleh sebab atau kesilapan yang tidak diketahui, Lot 196 di kawasan yang sama sebaliknya telah diturunkan dan didaftarkan kepada plaintif. Defendan-defendan, sebaliknya, telah menuntut bahawa tiada kesilapan berlaku dan pada hakikatnya, bapa plaintif telah menduduki atas Lot 196 yang terletak di sepanjang pantai sehingga 1941 atau kawasan sekitarnya apabila penduduk di sepanjang pantai tersebut telah dipindahkan disebabkan oleh satu kecemasan. Akibat daripada pemindahan secara terpaksa tersebut, bapa plaintif telah memohon dan memperoleh kebenaran daripada defendan pertama untuk menduduki sementara tanah Lot 639. Adalah dihujahkan bahawa hanya selepas Lot 196 mengalami hakisan sepenuhnya bapa plaintif telah menimbulkan satu dakwaan kesilapan di dalam pendaftaran pemindahan tersebut.

A Adalah juga dihujahkan bahawa di dalam beberapa kejadian, defendan pertama telah mendesak bapa plaintif untuk melepaskan dan menyerahkan milikan kosong Lot 639 tetapi malangnya tidak berjaya. Defendan-defendan telah pada tahun 1966 memulakan satu tindakan sivil terhadap bapa plaintif menuntut milikan kosong Lot 639 tetapi kemudiannya telah dibatalkan atas alasan ketiadaan B bidang kuasa. Justeru itu, defendan-defendan telah menuntut balas untuk satu perintah bahawa plaintif serta-merta melepaskan dan menyerahkan milikan kosong Lot 639 tersebut selain menuntut ganti rugi untuk pencerobohan dan kos. Peguam plaintif menghujahkan bahawa defendan-defendan telah diestopkan daripada bergantung C kepada pembelaan ini kerana ia tidak ditimbulkan di dalam tindakan defendan-defendan yang mula-mula.

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan tuntutan balas defendan dengan kos:

D (1) Bapa plaintif seorang sahajalah yang boleh memberikan keterangan apakah tujuan asal yang telah dipersetujui bersama oleh kedua-dua pihak dan memandangkan beliau telah meninggal dunia sebelum perbicaraan tindakan ini, plaintif akan mengalami gangguan hebat apabila keterangan demikian tidak mencukupi. Dakwaan kesilapan yang sama tersebut hanya satu tekaan oleh E plaintif tanpa bantuan apa-apa keterangan sokongan untuk menunjukkan bahawa apa yang dirancang dan dipersetujui adalah untuk menjual Lot 639 oleh defendan-defendan kepada bapa plaintif dan bahawa tujuan tersebut telah kekal tidak diubah sehingga masa pelaksanan pemindahan tersebut (lihat ms 610I–611A, 615G).

F (2) Mahkamah sesyen tidak memberikan apa-apa penghakiman atas merit pada tahun 1966 kerana mahkamah tidak diberikan bidang kuasa yang diperlukan untuk menangani tindakan sedemikian dan oleh itu ia telah dengan wajarnya ditolak. Juga, plaintif-plaintif (defendan-defendan di dalam kes ini) tidak menimbulkan G isu Lot 196 kerana ia bukan merupakan fakta di dalam isu tersebut. Pada hakikatnya secara langsung satu tuntutan untuk mendapat kembali milikan Lot 639 dan apapun relevansi Lot 196 memperlihatkan, akan dibuktikan oleh keterangan. Oleh itu, tidak ada penegasan yang perlu dipohon di dalam penyataan tuntutan terdahulu dan aduan peguam tentang peninggalan tersebut tidak H dapat dipertahankan (lihat ms 615A, C–D).

(3) Plaintif tidak berjaya untuk mengemukakan keterangan yang mencukupi sama ada secara lisan atau dokumentasi, terutamanya berhubung dengan lot yang pihak-pihak tersebut berniat untuk pindahkan, untuk memenuhi keperluan yang sedia maklum untuk I pemberian remedi pembetulan. Sewajarnya, pendaftaran pemindahan di Pejabat Daerah, Bachok telah dilaksanakan dengan betul dan sewajarnya (lihat ms 618F–G).]

Notes

For cases on mutual/common mistake, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2731–2732.
For cases on estoppel, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1666–1713.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)
Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252 (refd)
Cooke v Rickman [1911] 2 KB 1125 (refd)
Humphries v Humphries [1910] 2 KB 531 (refd)
Oh Hiam & Ors v Tham Kong [1980] 2 MLJ 159 (refd)
Sithambaram Chettyar v Chong Fatt [1939] MLJ 298 (refd)
Yuson Bien & Anor v Bankers Trust Co Ltd [1980] 1 MLJ 32 (refd)

Legislation referred to

National Archives Act 1966
National Land Code 1965 s 341
Specific Relief Act 1950 s 30
Rules of the High Court 1980 O 18 r 13

Wan Mustapha bin Haji Ali (*Wan Mustapha & Co*) for the plaintiff.
C Jegathesan (*C Jegathesan & Co*) for the first, second and eighth defendant.

Idris J: The plaintiff's father (Daud bin Deris) filed a suit against the defendants claiming for a declaration that:

(1) the plaintiff did purchase $^{3}/_{5}$ shares of Lot 639 Mukim Perupok, Daerah Perupok in 1932 and not Lot 196;

(2) an order that $^{237}/_{360}$ shares of this lot be registered in the name of the plaintiff;

(3) an order that Lot 196 to be transferred to Setawa bte Hussin, Senal bte Hussin dan Siti bte Hussin or their beneficiaries or otherwise;

(4) an injunction restraining the defendants or any of them from interfering with plaintiff's occupation of Lot 639;

(5) further and other relief.

However, before the suit came on for trial Daud bin Deris passed away and by a subsequent application Mat Roni bin Daud, a natural and lawful son of the deceased, was made a representative of the estate of the deceased and was accordingly substituted as the plaintiff.

The defendants were the registered co-owners of a piece of land known and identified as Lot No 639 Mukim Perupok, Daerah Perupok, Bachok. Of particular concern were the shares of the first defendant (Siti bte

Hussin), the second defendant Said bin Mustapha who derived title by transmission from the estate of Setawa bte Hussin and the eight defendant Che Yam bte Che Lah who also derived title by transmission from the estate of Senal bte Hussin. It would also be noted that at a certain material time Setawa bte Hussin, Senal bte Hussin and Siti bte Hussin were also the registered owners of Lot 196 in the same Mukim of Perupok, Daerah Perupok, Bachok in equal shares. According to the statement of claim, it was averred that in 1932 the plaintiff's father bought all the undivided shares in Lot 639 Mukim Perupok Daerah Perupok, Bachok belonging to Setawa bte Hussin, Senal bte Hussin (both since deceased) and Siti bte Hussin (first defendant) who were the registered owners of $^{1}/_{5}$ share each.

It was alleged by the plaintiff that the transfer of the said portion was effected at the Land Office Bachok but 'for unknown reason or mistake Lot 196 in same area instead was transmitted and registered to plaintiff.'

Pursuant to the said purchase, the plaintiff claimed that his father went into occupation of the said land since 1932 to this very day and had planted coconut trees and had also erected a house thereon. Consequent upon the said mistake or erroneous registration, it was further alleged that the three defendants referred to above had 'unlawfully acquired Lot 639 when they knew or ought to know that plaintiff owned $^{237}/_{350}$ shares in Lot 639 and had since gone into occupation of the said land.'

As indicated earlier though Lot 639 was jointly owned by the defendants but nevertheless the crux of the plaintiff's claim was apparently directed towards the shares of the first defendant (Siti bte Hussin) and the predecessors in title of the second defendant and the eight defendant namely Setawa bte Hussin and Senal bte Hussin respectively which were alleged to have been disposed of by purchase to the plaintiff's father.

The three defendants namely the first defendant, the second defendant and the eight defendant in their defence contended that the first defendant and the predecessors in title of the second and eight defendants never sold Lot 639 to the plaintiff's father but however admitted that they did sell the whole of their shares in Lot 196 in the year 1932. The three defendants further claimed that the plaintiff's father went into occupation of Lot 196 which was situated along the shore line until 1941 or thereabouts when the inhabitants along the shore line were evacuated in anticipation of the imminent invasion by the Japanese which saw the Bachok coast line being declared a likely invasion route of the enemy. The three defendants further contended that consequent upon the forced evacuation, the plaintiff's father sought and obtained leave of the first defendant to occupy temporarily Lot 639 which was then a vacant lot for the purpose of habitation only. It was further contended that over the years Lot 196 was steadily eroded by the sea until it was eventually wiped out of all traces of it. It was only after the disappearance of Lot 196 that the plaintiff's father came up with an allegation of error in the registration of transfer by the Pemungut Hasil Tanah, Bachok. The three defendants also claimed that on a number of occasions the first defendant demanded the plaintiff's father to quit and

deliver up vacant possession of the said Lot 639 but unfortunately to no avail which thereby culminated in the first defendant instructing her solicitor to serve a notice on the plaintiff's father to quit and deliver up vacant possession of the land by 31 August 1982 at the latest. Inspite of such notice being sent the plaintiff's father continued to hold over the occupation of Lot 639 in trespass and hence the three defendants counterclaimed for an order that the plaintiff forthwith quit and deliver up vacant possession of the said land Lot 639 in addition to claiming damages for trespass and costs.

From the pleadings it would appear that the plaintiff grounded his claim for necessary rectifications on the basis of mutual mistake, pursuant to s 30 of Specific Relief Act 1950. Section 30 reads:

> When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Chitty on Contracts (27th Ed) Vol 1 para 5-045 spoke of the burden of proof placed on the party claiming to secure rectification:

> The burden of proof is on the party seeking rectification. He must produce 'convincing proof' not only that the document to be rectified was not in accordance with the parties' true intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions. It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract. The denial of one of the parties that the deed as it stands is contrary to his intention ought to have considerable weight, and unless the other party can convince the court that the document does not represent both parties' intentions at the time of execution, rectification will only exceptionally be ordered. Indeed, it has been said that it is not sufficient that the written contract does not represent the true intention of the parties; it must be shown that the written contract was actually contrary to the intention of the parties.
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> Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document.

See also Federal Court decision in *Yuson Bien & Anor v Bankers Trust Co Ltd* [1980] 1 MLJ 32, Privy Council decision in *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 and also *Cheshire & Fifoot's Law on Contract* (8th Ed) at p 219.

Referring to the evidence adduced on behalf of the plaintiff, it appeared to have suffered a great handicap for his father died before the trial and it seemed that he was the only one who could testify of the original intention mutually agreed upon by both parties and also to establish that such intention continued unaltered to the time of the execution of the transfer.

Since such evidence was one of the requisites necessary to move the court to grant the equitable remedy of rectification, the plaintiff would suffer a great setback when such evidence was lacking.

As could be gathered from the evidence tendered for the plaintiff through SP1, SP2 and SP3 they could only say that they were born in the house built by their father and except for SP1 (plaintiff) they left the house soon after their marriage while the plaintiff continued to live in the said house. They all did not seem to have any knowledge as to what really transpired earlier relating to the land, how the family came to stay on the land as they were then still small though they knew that their father bought a piece of land from the first defendant and her two sisters. Furthermore none of the witnesses could say whether or not their father attended the enquiry under the Kelantan Land Settlement Ordinance No 51/55 when the area was declared a settlement area for the purpose of the said Ordinance. Such enquiry was held to enable the District Officer to consider any claim recorded from persons who have any interest in the land.

So much for the evidence adduced on behalf of the plaintiff. Now to discuss the evidence for the defence. Only the first defendant Siti bte Hussin was able to testify as her other two sisters had already passed away. She confirmed that she and her deceased sisters were at a certain time the registered owners in equal shares of a piece of land situated near the shore line of Bachok though did not know the lot number but nevertheless the said land had been eroded and eventually wiped out of all traces by the sea (counsel for both parties agreed the land in question was Lot No 196). The first defendant and her two sisters sold their respective shares in the said land to Daud bin Deris, the father of the plaintiff before the Japanese occupation. She also explained that the location of the land was in Kampong Kubang Golok in the Mukim of Perupok in the district of Perupok, Bachok.

She also said that she was one of the registered owners of land Lot 639 also situated in the same mukim and daerah. She identified pp 13 and 14 of ADB as certified true copies of certificate of search pertaining to Lot 639 Mukim Perupok, Daerah Perupok, Bachok.

She went on to tell the court that before the Japanese occupation the plaintiff's father used to occupy the land sold to him (ie Lot 196) and some time later the lands around that area were fenced up and were planted with explosives by the British and Lot 196 was no exception. As a result the plaintiff's father requested that he be allowed to stay on land Lot No 639 as a temporary measure pending securing an alternative site. However, contrary to his undertaking he remained and continued to remain on the said land on the pretext that he had bought it from her and her sisters. Lot 196 was eventually being wiped out of all traces by the sea after the Japanese left the country. She further informed the court that on a number of occasions she used to request the plaintiff's father to vacate the land and when her request went unheeded she finally obtained the services of a lawyer to send a notice to the plaintiff's father demanding that he gave up vacant possession of the land. She claimed that she was unable to utilize the

land and requested the court's order to remove the plaintiff from the said land Lot No 639. A

On being cross-examined she said that she and her two sisters jointly owned two other lands in the same Daerah of Perupok. She disagreed with plaintiff's counsel when suggested to her that no such fencing was ever put up. She said the area that was being fenced up started from the shore line and extended to some lands in the interior. She claimed that plaintiff's father continued to occupy Lot 639 during Japanese occupation and reiterated the understanding agreed upon between them when the father was allowed to occupy Lot 639. And on breaching the understanding she and the other owners of Lot 639 instituted a legal action in 1966 against the plaintiff's father for recovery of possession of the said land but the action was dismissed by the court for want of jurisdiction. She denied on being suggested that what the plaintiff's father intended was to purchase Lot 639 and by mistake Lot 196 was instead quoted in the transfer form and that such mistake was known to her and her two sisters. She emphatically denied when put to her the reason why no action was taken since the last 60 years when the transfer was effected was because she and her sisters were aware that the transfer was meant for Lot 639. B C D

The defence called two other witnesses who were at certain relevant times the Pemungut Hasil Tanah (Collector of Land Revenue) Bachok. The first was Encik Khalid Kadir (now Dato' Khalid Kadir). He told the court that he was the Pemungut Hasil Tanah Bachok from 1970 to 1974. When referred to p 9 of ABD which was later put in and marked as D1, he confirmed that it referred to a certified true copy of Register Document Title for Lot 196 Mukim Perupok, Daerah Perupok, Bachok. E

According to D1, witness said that Lot 196 was formerly registered in the name of Mek Nga bte Bakar. Later it was transmitted to Senal bte Hussin, Setawa bte Hussin and Siti bte Hussin. On 16 January 1932, the shares of Senal bte Hussin and Setawa bte Hussin were transferred to Daud bin Deris (the plaintiff's father). On 4 August 1932, the share of Siti bte Hussin was also transferred to Daud bin Deris who was since then the sole registered owner of the said land. He informed the court that the location of the land was in Kampong Kubang Golok, Mukim of Perupok in the Daerah of Perupok, Bachok. Witness was also referred to p 3 of ABD which was later put in and marked as D2. According to witness, D2 was written by him and was addressed to Siti bte Hussin and Daud bin Deris. The intention was to notify both parties to come to his office for discussion regarding land Lot No 639 Mukim Perupok, Daerah Perupok, Bachok following a complaint by Siti bte Hussin in her letter dated 22 May 1973 which was marked as D4. Page 4 of ABD was also referred to witness who told the court that the said letter was also signed by him and it was addressed to Daud bin Deris explaining of his illegal occupation of Lot 639 and at the same time asked him to give up vacant possession of the land within one month of the date of the letter or else a police report might possibly be lodged against him by the land owners. Page 4 of ABD was put in and marked as D3. F G H I

A Witness also told the court that to the best of his recollection he did not receive any complaint nor any expression of dissatisfaction from Daud bin Deris regarding the purchase of Lot 196. Page 5 of ABD which was later put in as D5 was also referred to witness who confirmed that D5 was issued by him addressed to some of the registered owners of Lot 639. The letter was couched in the form of advice to the addressees to bring the matter to
B court. According to him pp 13 and 14 of ABD — put in and marked as D6 — was a certified true copy of Register Document of Title in respect of Lot 639. D6 showed all the entries made in connection with the said lot and the name of Daud bin Deris never appeared in the Register Document of Title and in fact there was no transaction made in 1932 pertaining to the said lot.

C On being cross-examined witness said Senal bte Hussin, Setawa bte Hussin and Siti bte Hussin each owned $^1/_5$ share in Lot 639 and he also confirmed that the transfer forms from Setawa bte Hussin, Senal bte Hussin and Siti bte Hussin to Daud bin Deris were no longer in the custody of the District Office, Bachok. It might be possible that the said transfer forms
D would now be kept in the National Archives. To a question by plaintiff's counsel, he did not think that on the transfer forms Lot 639 was mentioned. Witness explained that if there was any error in the form such error would be rectified and accordingly would be reflected in the register document of Title.

E The last witness called by the defence was SD3 — En Mohd Ghazalli bin Mohamed who was the Assistant Land Administrator, Bachok since 1 January 1997. He confirmed the transfer of Lot 196 in the Mukim of Perupok in the Daerah of Perupok, Bachok by the previous registered owners namely Setawa bte Hussin, Senal bte Hussin and Siti bte Hussin to Daud bin Deris who became the sole registered owner of the said land from
F 4 August 1932. On being referred to D6 witness confirmed that on 23 September 1931 the registered owners of Lot 639 Mukim Perupok, Daerah Perupok, Bachok were Husin bin Awang, Senal bte Hussin, Setawa bte Hussin, Siti bte Hussin and Merenik bte Bebakar. Though the date 23 September 1931 was not shown in D6 but such date could be obtained from Register Document of Title which was put in as D7. He also explained
G that Lot 197/639 as shown in D7 meant that Lot 197 and Lot 639 referred to the same land and later was identified as Lot 639 Mukim of Perupok, Daerah Perupok, Bachok — this was agreed to by both counsel.

Counsel for plaintiff in his submissions referred to a celebrated judgment of Lord Mansfield who said:
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> As mathematical and absolute certainty is seldom to be attained in human affairs, reason and public utility require that judges and all mankind in forming their opinion of the truth of facts should be regulated by the superior number of probabilities on the one side or the other.

I I would like to express my appreciation to counsel for drawing my attention to this judgment but nonetheless he could rest assured that it had all along been prominent in my mind on the emergence of probabilities and

improbabilities in any particular case. In fact I had not been unmindful of the burden placed on the plaintiff to establish its case — a very much lighter burden in comparison to a criminal trial as required of the prosecution; but even then in a criminal trial the prosecution was not required to prove its case to the hilt.

Counsel further submitted that it was rather absurd for the defendants to claim to have sold their land bearing Lot No 196 to the plaintiff's father as there was no such averment in an action brought by them against the plaintiff's father in the Sessions Court at Bachok for recovery of possession of Lot 639 and in the event the defendants were estopped from raising that issue now. To support his submissions counsel relied on the authorities of *Humphries v Humphries* [1910] 2 KB 531, *Cooke v Rickman* [1911] 2 KB 1125 and the local case of *Sithambaram Chettyar v Chong Fatt* [1939] MLJ 298.

It would be noted that *Cooke v Rickman* was decided following the decision in *Humphries v Humphries* which revolved around the principle of estoppel. It was held in *Cooke* that the defendant in the second action, who was also the defendant in the first action, between the same parties, was estopped from raising a new defence which was not raised in the first action. In *Humphries v Humphries* the facts were (at p 531):

> The plaintiff brought an action for arrears of rent alleged to be due under an agreement for a lease. The defendant relied on the defence that no agreement had been concluded, but did not raise any defence under s 4 of the Statute of Frauds. Judgment was given for the plaintiff.
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> Further arrears of rent having accrued due, the plaintiff brought a second action. In this action the defendant raised the defence that there was no memorandum or note in writing of the agreement for the lease sufficient to satisfy the requirements of s 4 of the Statute of Frauds.

Held by Court of Appeal, '*that the defendant, not having raised this defence in the first action, was precluded from raising it in the second action*'. It would be seen that the judgment in the first action was given by a court of competent jurisdiction and there was thus a finality in the litigation.

For a party to rely on the principle of estoppel it must establish the following constituent elements:

(i) that the alleged judicial decision was what in law is deemed such;

(ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;

(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;

(iv) that the judicial decision was final;

(v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;

(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive in rem.

In the instant case no judgment on the merits was given by the Sessions Court in 1966 as the court was not conferred with the necessary jurisdiction to deal with such an action and hence it was accordingly dismissed. The Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 held at p 190:

> (1) When a matter between two parties has been *adjudicated by a court of competent jurisdiction*, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between such parties. An estoppel *per rem judicatum* has been created as a result.
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> (2) ... Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.
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> (Emphasis added.)

It would be observed that in the action filed in 1966, the plaintiffs (defendants in the present action) did not raise the issue of Lot 196 as it was not a fact in issue — it was in fact directly a claim for recovery of possession of Lot 639 and whatever relevance Lot 196 would evince, would be borne out by evidence — thus no such averment would need to be pleaded in the statement of claim and counsel's complaint for such omission could not stand — in the result I rejected the issue of estoppel relied upon by the plaintiff.

The plaintiff's counsel submitted further that the evidence of SP1, SP2 and SP3 who claimed to have been born in the house built by their deceased father on Lot 639 was never disputed by the defence, thus it would go to support that Lot 639 was actually bought by their father or else the defendants would have instituted an action in a court of competent jurisdiction to recover possession thereof. It seemed that the plaintiff's claim to Lot 639 merely hinged on the evidence of birth of the three witnesses and their long occupation of the land without any interruption by any defendant and such indifference would further strengthen the plaintiff's claim of a possible existence of mutual mistake by both parties in stating the lot number at the time of registration of the transfer at the District Office Bachok when Lot 639 should have been quoted instead of Lot 196. Perhaps it should be pointed out that the alleged mutual mistake was only a conjecture by the plaintiff without the aid of any supporting evidence to show what was intended and agreed upon was to sell Lot 639 by the first defendant and her two deceased sisters to plaintiff's father and that intention remained unaltered to the time of the execution of the transfer. On the other hand defendant 1 explained to the court the circumstances leading to the plaintiff's father being given a licence to temporarily occupy Lot 639 and of the undertaking given, but unfortunately the father reneged on his undertaking and refused to budge from the land when called upon to do so by the defendants.

The first defendant had given a lucid and straight forward evidence although at one point there seemed to have occured a certain confusion in her evidence resulting therefrom her veracity was questioned by plaintiff's counsel. Her evidence that led to confusion was when she said:

> Semasa saya membuat pindah milik di Pejabat Tanah Bachok, saya menjual tanah di tepi laut sungguhpun saya tak ingat nombor lot. Kakak saya beritahu penjualan kepada Daud apabila saya balik dari Negeri Thai. Saya setuju menjual tanah itu. Saya pergi tunjuk tanah itu — *terletak lebih kurang 1/2 batu daripada gig air. Sebenarnya tanah itu terletak di Kampong Kubang Golok, lebih kurang $^1/_2$ batu dari Perupok.*
>
> (Emphasis added.)

Plaintiff's counsel contended that the first defendant seemed to be an intelligent but cunning witness especially when she realised she had made an error she quickly changed her version. For myself having observed her demeanour and the way she gave evidence I was convinced that she was a witness of truth and that what she really meant was that she and her sisters sold the land near the sea (though not remembering the lot number) and the land was in Kampong Kubang Golok about $^1/_2$ mile from Perupok. This was more so when earlier in her evidence she said that she and her sisters sold the land located near the sea and counsel for both parties agreed that the land she referred to was Lot 196. It was felt that counsel's contention would be more weighty had there been evidence to show the location or distance of Lot 639 from the sea, more so if such distance would be in the region of $^1/_2$ a mile.

Plaintiff's counsel also referred to the evidence of SD2, Dato' Khalid Kadir who said that the transfer of land Lot 196 Mukim Perupok, Daerah Perupok, Bachok to Daud bin Deris by the three previous owners was done in two separate transactions. However, counsel claimed what really surprised him was when told that both transfer forms were no longer in the custody of District Office, Bachok. But to elaborate, witness went on to say that the said forms might be in the custody of the National Archives as required by the National Archives Act 1966. It seemed that despite the indication given by witness no attempt was made by plaintiff's counsel to procure certified true copies of the said transfer forms which was supposedly to be an obligation imposed on the plaintiff.

SD2 also informed the court he had written a few letters to both parties in connection with the occupation of Lot 639 but when no positive result was achieved, he finally wrote a letter dated 20 June 1973 (D5) to the first defendant and two other defendants advising them to secure the services of Legal Aid Bureau to help pursue the matter in court. When asked by defence counsel witness agreed that from the tones of the letters they showed that the first defendant had taken some concrete steps to settle the question of trespassing on land Lot 639 by plaintiff's father.

Another issue raised by plaintiff's counsel was on the question of pleading ie on the statement of defence as filed by the defendants. Counsel claimed that there was no specific traverse on the plaintiff's averment in para 2 of the statement of claim and in consequence thereof following the rules of procedure it would be tantamount to an admission by defendants that there was a mistake in the registration of the transfer.

Paragraph 2 of the statement of claim was as hereunder:

2 The transfers were made at the land office by the three sellers in that year but for unknown reason or mistake lot 196 in the same area instead was transmitted and registered to the plaintiff.

The statement of defence was however settled as follows:

3 In regard to the matters alleged in paras (2), (3), (4) and (5) the first defendant avers and states as hereunder.

4 In 1932 the Registered Owners of all that parcel of land known and identified as Lot 196 were:

1. Senal bte Hussin
2. Setawa bte Hussin, and
3. Siti bte Hussin.

5 The subject matter of a transaction of sale between the plaintiff on the one part and the said Senal bte Hussin, Sald bin Hussin and Siti bte Hussin (the first defendant) was Lot 196 as follows:

1.	16 January 1932	Senal bte Hussin and Setawa bte Hussin; sold their $^1/_3$ shares each to the plaintiff.
2.	4 August 1932	Siti bte Hussin (the first defendant) sold her $^1/_3$ share to the plaintiff.

6 The land the plaintiff bought was Lot 196 and not Lot 639.

7 The plaintiff until 1941 or thereabouts occupied Lot 196 which was situated along the shore-line.

8 With the impending invasion of Peninsular Malaysia by the Japanese inhabitants along the shore-line are evacuated the Bachok coastline being declared a likely invasion Route of the enemy.

9 In connection with the forced evacuation the plaintiff sought for and obtained the leave of the first defendant to occupy temporarily Lot 639.

10 Lot 639 was then a vacant lot and the plaintiff obtained licence to occupy the land for the purpose of habitation only.

11 Over the years Lot 196 was steadily eroded away by the sea until the sea eventually wiped-out all trace of it.

12 As such Lot 196 does not exist anymore.

13 It is after Lot 196 had been totally claimed by the sea that the plaintiff started the allegation that there had been an error of registration on the part of the Pemungut Hasil Tanah.

Order 18 r 13 of the Rules of the High Court 1980 stipulated:

(1) Subject to para (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading

(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to para (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegation, or a general statement of non-admission of them, is not a sufficient traverse of them.

Looking at the statement of defence as a whole I was satisfied that it was a statement of non-admission of the claim that would by necessary implication constitute a specific traverse of para 2 of the statement of claim and thus the plaintiff's contention on this question could not sustain.

The final issue raised by plaintiff's counsel was limitation since the defendants did not institute any or any further action upon the dismissal of the claim in Sessions Court, Bachok in 1966, hence they were caught by Limitation Act 1953 and were thereby precluded from taking any action or raising the line of defence as they did. It would be noted that the plaintiff's counsel only mentioned generally the Limitation Act without going into details of the relevant provision. Be that as it may, the simple answer to the issue raised could be found in s 341 of National Land Code which said:

> Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein, and accordingly, the Limitation Act 1953, shall in no circumstances operate to extinguish any title to, or interest in, land.

See also the decision of Peh Swee Chin J (as he then was) and the reasons therein given in *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 at p 253 with which I fully associated myself with. I might further add that if the question of delay in pursuing the matter could be attributed to the defendants, it could, by the same token, be levelled at the plaintiff as well. This was particularly so when the plaintiff's father in 1966 was sued by defendants for recovery of Lot 639 for being in unlawful occupation thereof and though it was dismissed for reasons stated earlier, it would have been expected of the plaintiff to file the instant application very much earlier with a view to getting a prompt and final determination of the true and rightful ownership of the said lot.

In view of the foregoing and looking at the evidence presented by and on behalf of the plaintiff I was not satisfied that he had successfully adduced sufficient evidence either verbal or documentary, especially relating to the lot which the parties intended to be transferred, to satisfy the well known requirements for the grant of the remedy of rectification. Accordingly, I held that the registration of transfer at the District Office, Bachok was properly and correctly carried out. I therefore dismissed the plaintiff's claim for declarations with costs.

There however remained another question to decide, ie the defendants' counterclaim. According to the first defendant she had on many occasions requested plaintiff's father to quit and deliver up vacant possession of Lot 639 but to no avail and as a result she had to consult her solicitor several times on this matter. However, she could not remember having instructed the solicitor to send a notice to plaintiff's father to vacate the land, but to this end, counsel for plaintiff admitted having been handed by his client (plaintiff's father) a letter from defendants' solicitor dated 19 July 1982 addressed to the client demanding him to quit and deliver up vacant possession of Lot 639 and he had given a reply on behalf of his client. In fact this issue was pleaded by defendants in the counterclaim. Having

A considered the facts as set out above I allowed the defendants' counterclaim with costs and ordered that plaintiff do quit and deliver up vacant possession of Lot 639 Mukim Perupok, Daerah Perupok within six months from the date of this order. I also ordered that the Deputy Registrar of the High Court, Kota Bharu do assess the damages for trespass to be paid by plaintiff to defendants concerned effective from 19 July 1982 to the date of
B vacant possession.

Plaintiff's claim dismissed with costs. Defendants' counterclaims allowed with costs.

Reported by Ng Kian Pin

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